FILED

No. 97 • 333 AUG 20 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

DENNIS WILLIAMS and RICHARD DREILING,

Petitioners,

vs.

WMX TECHNOLOGIES, INC. formerly known as Waste Management, Inc. and ENVIRONMENTAL INDUSTRY ASSOCIATIONS, formerly known as National Solid Waste Management Association; DEAN L. BUNTROCK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

BEN C. BROOCKS
H. VICTOR THOMAS
DAVID ANDIS
BROOCKS, BAKER
& LANGE, L.L.P.
808 Travis Street
Suite 1700
Houston, Texas 77002
(713) 222-1434

DIANA E. MARSHALL
J. TYNAN KELLY
PAUL J. FRANZETTI
Counsel of Record
SCHECHTER & MARSHALL, L.L.P.
1111 Bagby
Suite 1950
Houston, Texas 77002
(713) 655-0300

DONNA K. GRAY, P.C.
One Riverway
Suite 1400
Houston, Texas 77056
(713) 439-7444

Attorneys for Petitioners

50 pp

QUESTIONS PRESENTED

1. Where a district court enters an order denying a motion to dismiss under Fed. R. Civ. P. 9(b) for failure to plead fraud sufficiently but certifies such order for interlocutory appeal under 28 U.S.C. § 1292(b), and the court of appeals concludes reversal is proper, does the court of appeals exceed its jurisdiction by denying the plaintiff an opportunity to amend the complaint?

2. Whether the decisions of the district court and the court of appeals to entertain this appeal under 28 U.S.C. § 1292(b) was improvident because of the failure of either court to identify or address any "controlling question of law as to which there is a substantial ground for difference of opinion"?

3. Whether the court of appeals decision improperly eliminated or restricted the right of the petitioners to seek leave to amend their complaint to comply with Fed. R. Civ. P. 9(b)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioners Dennis Williams and Richard Dreiling and respondents WMX Technologies, Inc., which was formerly known as Waste Management, Inc., Environmental Industry Associations, which was formerly known as the National Solid Waste Management Association, and Dean L. Buntrock. Petitioners Williams and Dreiling were the plaintiffs in the district court and respondents were defendants in the district court.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement Of Jurisdiction	1
Statutory Provision And Rules Involved	1
Statement Of The Case	2
A. Factual Background	4
B. Summary Of Proceedings Below	7
Reasons For Granting The Writ	10
I. Under *United States v. Stanley*, The Court Of Appeals Lacked Jurisdictional Authority To Limit The District Court's Ordinary Discretion To Allow Pleading Amendments Under Fed. R. Civ. P. 15.	10
II. This Certified Appeal Is Improvident Because There Is No "Controlling Question Of Law" Within The Meaning Of 28 U.S.C. § 1292(b) At Stake.	11

Contents

Page

III. The Trial Court Has Exclusive Discretion To Permit Or Deny Amendments. 14

Conclusion 18

TABLE OF CITATIONS

Cases Cited:

Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978) 13

Dennis Williams, Richard Dreiling, et al v. WMX Technologies, Inc., et al, No. 95-0573 1

Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981) 16

Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) 17

In re Healthcare Compare Corp. Sec. Litig., 75 F.3d 276 (7th Cir. 1996) 9, 11, 12, 13, 14

Johnson v. Jones, 514 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) 13

Melder v. Morris, 27 F.3d 1097 (5th Cir. 1994) 12

Mills v. Polar Molecular Corp., 12 F.3d 1170 (2d Cir. 1993) 12

Contents

	Page
Paschall v. Kansas City Star Co., 615 F.2d 403 (8th Cir. 1977)	13
S.B.L. v. Evans, 80 F.3d 307 (8th Cir. 1996)	11, 13
Shushany v. Allwaste, 992 F.2d 520 (5th Cir. 1993)	12
Swint v. Chambers County Commission, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)	13
Tuchman v. DSC Communications Corp., 14 F.3d 1061 (5th Cir. 1994)	12
United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987)	4, 10, 13
Williams v. WMX Technologies, 112 F.3d 175 (5th Cir. 1997)	1, 3
Yamaha Motor Corporation, U.S.A. v. Calhoun, __ U.S. __, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1995)	4, 10, 11, 13
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)	15

Statutes Cited:

15 U.S.C. § 78u-4(b)	12
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1292(b)	i, 1, 3, 4, 10, 11

Contents

Page

Rules Cited:

Federal Rules of Civil Procedure:

Rule 8 14

Rule 9 14

Rule 9(b) ..... i, 2, 3, 11, 12, 13, 14

Rule 12(b)(6) 3, 11, 14, 15

Rule 15 ..... 10, 14

Rule 15(a) 2, 15

Code of Federal Regulation:

17 C.F.R. § 240.10b-5 8

Other Authorities Cited:

5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1300 (2d ed. 1990 & Supp. 1996) 18

Wall Street Journal, *"Waste of a Sort: Curbside Recycling Comforts the Soul, But Benefits Are Scant"* by Jeff Bailey, January 19, 1995 ..... 6, 7

Contents

Page

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Fifth Circuit Filed April 24, 1997 .. 1a

Appendix B — Order of the United States District Court for the Southern District of Texas, Houston Division Entered March 5, 1996 ..... 13a

Appendix C — Order of the United States District Court for the Southern District of Texas, Houston Division Entered December 12, 1995 ..... 16a

Appendix D — Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing Filed May 22, 1997 ..... 18a

Appendix E — Order of the United States District Court for the Southern District of Texas, Houston Division Entered June 6, 1997 ..... 20a

Appendix F — Order of the United States District Court for the Southern District of Texas, Houston Division Entered July 15, 1997 ..... 21a

Petitioners Dennis Williams and Richard Dreiling respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Williams v. WMX Technologies*, at 112 F.3d 175 (5th Cir. 1997) (Appendix A). The decisions of the district court in *Dennis Williams, Richard Dreiling, et al. v. WMX Technologies, Inc., et al.*, No. 95-0573 in the United States District Court for the Southern District of Texas are unpublished. Copies of the relevant orders are submitted as Appendices B, C, E, F.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered April 24, 1997. (App. at 1a). The Court of Appeals denied timely Petitions for Rehearing and for Rehearing En Banc on May 22, 1997. (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULES INVOLVED

28 U.S.C. § 1292(b) provides in relevant part:

> (b) When a district judge, in making an not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate

> appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an apeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order.

Federal Rule of Civil Procedure 9(b) provides:

> (b) **Fraud, Mistake, Condition of Mind.** In all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind may be averred generally.

Federal Rule of Civil Procedure 15(a) provides:

> (a) A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

STATEMENT OF THE CASE

This appeal is founded on the fundamental unfairness imposed on petitioners by the judgment of the court of appeals. This decision has denied petitioners the ordinary right to replead to correct pleading requirements that were imposed on petitioners *for the first time* at the appellate level. If it were meaningful to argue that the court of appeals has "discretion"

in pleading matters, its judgment would require reversal under the abuse of discretion standard applicable to trial courts in the Fifth Circuit. *See* part III, *infra*. A precedent that denies plaintiffs such fundamental procedural rights, if allowed to stand, would alter federal pleading and motion practice in a manner contrary to the clear intent of the Federal Rules of Civil Procedure.

This is a securities fraud case. Petitioners Dennis Williams and Richard Dreiling were formerly the sole owners of a waste hauling firm in Houston, Texas called Texas Sanitation Industries, Inc. ("TSI"). On February 26, 1992, after substantial face to face merger negotiations, TSI was merged into Waste Management, Inc., the predecessor of defendant WMX Technologies ("WMX"). Williams and Dreiling exchanged all of the stock in TSI for WMX shares. At closing, these newly issued WMX shares were trading in a range in excess of $40 per share and a market value of the transaction exceeded $5,500,000. On December 30, 1994, WMX shares closed at $26-1/8th, after falling to lows near $23/per share. Williams and Dreiling had each suffered losses exceeding $1,000,000.

In a now standard practice, defendants WMX and Environmental Industries Association ("EIA") responded to the case with motions to dismiss under Rules 12(b)(6) and 9(b), Fed. R. Civ. P. After substantial briefing and oral argument of the motions, the district court denied the motions. Defendants moved for reconsideration or for certification of the order denying the motion to dismiss, and the court denied reconsideration, but granted leave to appeal under 28 U.S.C. § 1292(b). (App. at B). The United States Court of Appeals for the Fifth Circuit accepted the appeal and reversed on the ground that petitioners complaint was deficient under Rule 9(b). *Williams v. WMX Technologies*, 112 F.3d 175 (5th Cir. 1997). (App. A at 12a).

This petition for certiorari is based on three jurisdictional issues, each of which requires reversal of the judgment of the court of appeals. Two relate specifically to the scope of appellate jurisdiction under 28 U.S.C. § 1292(b). First, to the extent it reaches matters associated with amendment of pleadings, the judgment of the court of appeals exceeds the scope of its appellate jurisdiction under this Court's decisions in *United States v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987) and *Yamaha Motor Corporation, U.S.A. v. Calhoun*, __ U.S. __, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1995). Second, and perhaps more importantly, the decisions of both the district court and the court of appeals to grant leave to the appeal were improvident and must be vacated. The requirement of 28 U.S.C. § 1292(b) that there exist in the appeal a "controlling question of law as to which there is a substantial ground for difference of opinion" *has not been satisfied*. The lower courts have substituted a relaxed "close question" standard for the "controlling question of law" standard. This "close question" standard, if accepted, will make permissive interlocutory appeals at the pleading stage of cases a routine "second opinion" practice that is inconsistent with settled norms applicable to such appeals. Finally, the judgment must be reversed because pleading dismissals at the appellate level are inconsistent with the division of responsibility between trial and appellate courts in the federal system. Discretionary pleading matters reside with the district courts, and the court of appeals should not reach into such matters.

A. Factual Background

As described above, Williams and Dreiling obtained their WMX shares in a merger transaction. As a securities fraud case its is a hybrid because it includes a mix of direct, face to face misrepresentations, distortions and omissions *and* allegations of misrepresentations and omissions of disclosure of material fact causing overvaluation of WMX shares on the public markets.

Williams' and Dreiling's decisions to give up their own business for shares in WMX was based on a mix of factors including the following material considerations: (1) Like the public at large they believed the nation faced a "garbage crisis" or "disposal crisis," *i.e.*, that a shortage of landfill capacity existed; (2) They knew from a wide variety of sources including their personal knowledge of the industry that WMX was the holder of the largest market share of the allegedly "scarce" asset of landfill capacity; (3) TSI's business depended an on landfill access, especially the WMX operated landfill that TSI used; (4) In direct negotiations, Lynn Lantrip, a WMX acquisitions representative, told them that TSI faced rising landfill fees and possible loss of access to the WMX landfill because WMX would eventually close it to independent haulers in order to conserve capacity for its own waste hauling operations; and (5) From Lantrip and from public sources, including the stock price (and rising price trend) of WMX shares, they came to believe that the landfill shortage would benefit WMX and its stockholders because of the increasing returns that WMX would enjoy as the holder of the largest market share of any operator of the allegedly "scarce" asset of landfill capacity.

Plaintiffs views received corroboration from other sources in the trade press and the public media. TSI was a member of the National Solid Waste Management Association (now defendant EIA). Williams and Dreiling received information and publications from EIA through its house organ, *Waste Age*. Much of EIA's information, press releases and stories were picked up and echoed in the popular press. EIA constantly trumpeted the message that the nation was running out of landfill space. These specific factors, as amplified by a barrage of press reports and stories regarding a "garbage crisis" or "disposal crisis" convinced Williams and Dreiling to sell out to WMX.

At the time of the merger, Williams and Dreiling did not

know that the public and industry perception of a "landfill crisis" was inaccurate. Landfills were not, in fact, a scarce asset and WMX, both at the time and now, has possessed significant *overcapacity* of landfills. WMX shares were significantly overvalued because of this, a fact that was not disclosed adequately by WMX.

Petitioners case, it must be remembered depends *not only* on the fact that WMX misrepresented, or omitted to disclose, material facts in the public markets. Material facts, including the truth of the landfill capacity matter should have been conveyed to them directly. They were not and are not sophisticated or practiced investors. Petitioners did not know (and defendants failed adequately to disclose) that defendant Dean Buntrock, the founder of WMX, repeatedly sold significant blocks of his stock into the rising market for WMX shares and on information and belief camouflaged the sales. This conduct belies WMX's suggestion that its stock price was the product of a fair market valuation. Williams and Dreiling did not know that Buntrock was the founder of defendant EIA and that WMX in fact dominated the organization. They did not know or understand that EIA's house organ, "Waste Age," promoted the perception of a "landfill crisis" even though its experts knew that no shortage of landfill capacity existed.

The share price of WMX shares began to trend down after the completion of the TSI deal. On January 19, 1995, Williams and Dreiling read an article in the *Wall Street Journal* that included the following:

> Big trash hauling companies certainly knew there was no landfill crisis, but helped spread the word of one anyway even as they increased their dump and incineration capacity. The perception of the shortage

> helped them raise dump fees and fatten profits. . . . The public's belief in a garbage crisis helped WMX (formerly Waste Management, Inc.) and its competitors pass along huge price increases to municipalities and other customers. . . . The talk of a crisis was misleading, WMX now acknowledges. Though the company observes some temporary local shortages, "we never believed there was a disposal crisis" says Jane Witherage, a vice president. "Did we go out and do a public policy education program on that? No." Given the public mood, she adds, it is unlikely the company would have been believed. Instead, WMX was still telling customers as recently as 1993, "this nation is quickly running out of places to dispose of trash."[1]

To Plaintiffs, these statements by Ms. Witherage constituted a clear and direct admission of fraud. This case was filed just over a month later.

B. Summary Of Proceedings Below

The original Complaint was filed on February 24, 1997 just before the third anniversary of the completion of the TSI-WMX merger.[2] The Original Complaint named WMX, Dean Buntrock

1. Wall Street Journal, *"Waste of a Sort: Curbside Recycling Comforts the Soul, But Benefits Are Scant"*, by Jeff Bailey, January 19, 1995.

2. In a puzzling and, in Plaintiffs' view, unfair criticism, the court of appeals attributed the lack of a specific reference in the Complaint to the "time and place" of the face to face misrepresentations to plaintiffs by the (Cont'd)

and certain other WMX insiders as defendants. In addition to their individual claims, Williams and Dreiling sought designation as representatives of two classes: (1) all WMX stockholders who purchased and sold WMX shares for a defined period of time; and (2) a more limited class of business sellers who obtained their shares in merger transactions similar to that engaged in by TSI.

Prior to service of the original complaint, petitioners amended their complaint as of right to add the defendant trade association and to make additional factual allegations. The first amended complaint was the first pleading *served* on defendants. It is the *same* pleading held sufficient by the district court but insufficient by the court of appeals. In the briefing and argument in the district court, both sides submitted extensive additional materials drawn from publicly available disclosures and press reports. After oral argument of the motions, the district court concluded that a securities fraud case had been sufficiently

(Cont'd)

WMX representative, Lantrip, to a "reluctance" related to the near expiration of the three year statute of repose applicable to cases under Rule 10b-5. (App. A at pp. 1a-12a). No similar limitations problems existed with respect to plaintiffs' claims under the three and four year limitations period applicable to plaintiffs' principal state law courts or the four year period under the Racketeer Influenced and Corrupt Organizations Act (RICO). Moreover, the complaint clearly alleges that Lantrip's misrepresentations took place in face to face meetings or in telephone conversations and that the misrepresentations were material factors that Plaintiffs to sell their business to WMX. Unless the Fifth Circuit's "time and place" requirements are intended to limit the right to bring fraud complaints to persons with photographic memories, diarists, keepers of phone logs, and possessors of dated, written misrepresentations, the allegations made should give WMX fair notice of the time, place and manner in which Lantrip made misrepresentations. They were made during the business negotiations directed to the sale of TSI and consummated on February 26, 1992, for the purpose of securing plaintiffs' agreement to sell their shares in TSI. If this is insufficient, the deficiency can clearly be cured through an amended pleading.

pleaded, and denied the motions to dismiss on December 11, 1995.

Subsequently, the defendants moved for reconsideration of the order denying their motions to dismiss or for certification of the order for immediate appeal. The certification motion relied on the sole authority of a Seventh Circuit decision, *In re Healthcare Compare Corp. Sec. Litig.*, 75 F.3d 276 (7th Cir. 1996). Based on the sole authority of the *Healthcare* decision, Judge Hittner concluded that "the issue of whether plaintiffs have satisfied the pleading requirement of [Rule] 9(b) satisfied" require certification, and granted the motion on March 5, 1996, *see* App. B. Judge Hittner also decided to stay all proceedings in the trial court pending the appeal. The Court of Appeals for the Fifth Circuit accepted the appeal and reversed.

Petitioners principal points in this appeal do not require extensive review of the opinion of the court of appeals. What is clear is that the district court exercised its discretion to consider the four corners of the complaint *and* the facts and factual theories of the case as developed in the record of the district court. By contrast, the opinion reflects that the panel considered the four corners the first amended complaint and little else. The key point is its disposition. Here the opinion states:

> We find that the amended complaint failed to state claims of fraud with the particularity required by Rule 9(b). Plaintiffs have failed in two attempts to plead with particularity. Their efforts have been carefully reviewed by an able district judge. The order of the district court denying the defendants' motion [sic] is REVERSED and the case is REMANDED to the district court with instructions to dismiss. REVERSED and REMANDED with instructions.

(App. A at pp. 1a-12a). Although opaque, this language seems to require dismissal of the complaint without leave to amend. The court of appeals denied petitions for panel rehearing or rehearing en banc directed to the repleading issue. (App. D). On remand the district court dismissed the complaint with prejudice, (App. E), and subsequently denied leave to amend — largely on the basis that the denial of rehearing by court of appeals precluded such action. (App. F). In summary, the Fifth Circuit's disposition was understood by the district court to require dismissal of petitioners' claims with prejudice and to require denial of plaintiffs' motion for opportunity to replead. (App. E, F). Whatever the merits of the panel's characterization of petitioners' theories of relief, its reasoning and holdings, petitioners believe that settled law and practice obligated the Fifth Circuit to afford petitioners the opportunity to file an amended pleading to correct its pleadings in the light of the court's views. It is for this reason that this petition for certiorari is brought to this court's attention.

REASONS FOR GRANTING THE WRIT

I.

UNDER *UNITED STATES v. STANLEY*, THE COURT OF APPEALS LACKED JURISDICTIONAL AUTHORITY TO LIMIT THE DISTRICT COURT'S ORDINARY DISCRETION TO ALLOW PLEADING AMENDMENTS UNDER FED. R. CIV. P. 15.

The preclusive mandate of the court of appeals in this case exceeds its jurisdictional authority under this Court's decisions in *United States v. Stanley*, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987) and *Yamaha Motor Corporation, U.S.A. v. Calhoun*, __ U.S. __, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1995). Under these decisions appellate jurisdiction under 28 U.S.C.

§ 1292(b) is confined to the specific order under review, but is authorized to "address any issue fairly included within the certified order." *Yamaha*, __ U.S. at __, 116 S. Ct. at 623. Here the *order* of the district court under review was the *denial* of defendants' motions to dismiss under Rules 12(b)(6) and 9(b). The issue of repleading was not reached and necessarily was not "an issue fairly included within the certified order." For this reason, the preclusive mandate of the court of appeals must be vacated. At a minimum, the court's instructions should have permitted further district court proceedings consistent with the opinion of the court of appeals.

II.

THIS CERTIFIED APPEAL IS IMPROVIDENT BECAUSE THERE IS NO "CONTROLLING QUESTION OF LAW" WITHIN THE MEANING OF 28 U.S.C. § 1292(b) AT STAKE.

28 U.S.C. § 1292(b) allows an immediate appeal by permission from an interlocutory order if the district court concludes and the court of appeals agrees that the:

> order involves [1] a controlling question of law as to which there is [2] a substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . .

28 U.S.C. § 1292(b); *S.B.L. v. Evans*, 80 F.3d 307, 310 (8th Cir. 1996) (noting three aspects of test). Here the district court certified its order denying the motions to dismiss based entirely on the authority of a Seventh Circuit's decision, *In re Healthcare Compare Corp. Sec. Litig.*, 75 F.3d 276 (7th Cir. 1996).

Like this case, *Healthcare* was a securities fraud case with class action allegations. It is similar to this case because the district court denied a motion to dismiss plaintiffs' complaint under Fed. R. Civ. P. 9(b) and subsequently certified the issue for appeal. It is *unlike* this case because the Court had dismissed a previous complaint but granted leave to replead. As reported in the appellate opinion, the district judge certified the matter for appeal because of his belief that it was a " 'close question' and . . . because a 'massive amount of discovery [is] lurking in this case' . . . 'that would just be down the drain if I'm wrong' " 75 F.3d at 279.

Petitioners urge that this "close question/massive discovery" formula of the *Healthcare* decision abrogates the "controlling question of law" limitation, especially in the circumstances of this case. (*See* App. A at pp. 1a-12a). The principal Fifth Circuit cases cited by the court of appeals under Rule 9(b) are *Melder v. Morris*, 27 F.3d 1097 (5th Cir. 1994); *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061 (5th Cir. 1994) and *Shushany v. Allwaste*, 992 F.2d 520 (5th Cir. 1993). These cases were briefed and considered in the district court. Neither court identified any undecided issues lurking within these cases. The only arguable novelties in the Court's opinion are its citation to the Second Circuit case of *Mills v. Polar Molecular Corp.*, 12 F.3d 1170 (2d Cir. 1993) and the court's declaration that its decision applies the standard of the Private Securities Reform Act, 15 U.S.C. § 78u-4(b), even though the case predates the effective date of that Act. The Court never explained how these additions changed the prior Fifth Circuit law. *Melder, Tuchman* and *Shushany* were settled, well understood authorities. The latter authorities supply no more than semantic changes to a well pronounced trend.

This Court should reject the "close question" formula. The dissenting judge in *Healthcare* noted that such matters as Rule

9(b) are cases specific and leave considerable room for disagreement by reasonable minds. Judge Ripple further observed to danger engendered by this relaxed standard: it transforms certification into a "second opinion" practice inconsistent with the policy of restricting interlocutory appeals to "exceptional circumstances." 75 F.3d at 285 (Ripple, J. dissenting) (*citing Coopers & Lybrand v. Livesay*, 437 U. S. 463, 475, 98 S. Ct. 2454, 2461, 57 L. Ed. 2d 351 (1978)). This expansion is inconsistent with the careful and restrictive policy contemplated by *Coopers*, *Stanley* and *Yamaha* and the Court's recent decisions restricting other forms of interlocutory appeal. *See Swint v. Chambers County Commission*, 514 U.S. 35, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) (limiting interlocutory appeals under collateral order doctrine and rejecting pendent party appellate jurisdiction) *and Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) (restricting "final order" appeals in qualified immunity cases). The appeal should be dismissed and the case remanded to the district court for reinstatement.

Petitioners further urge that this expansive approach conflicts with the more properly restrictive approach of the Eighth Circuit. In the similar context of summary judgment issues where the issue is the application of law, to fact the Eighth Circuit applies a ripeness standard to ensure that the appeal is based on a concrete record exists. *See S.B.L. v. Evans*, 80 F.3d 307, 310 (8th Cir. 1996). Such a standard requires "factual basis of the claim[s] [to be] developed so that 'we may make a precise decision upon a precise record — not an abstract answer to an abstract question.' " *Id.* (*quoting Paschall v. Kansas City Star Co.*, 615 F.2d 403, 407 (8th Cir. 1977)).

In this case, the district court denied defendants' motions to dismiss. If a ripeness element had been applied, a crucial distinction becomes plainly apparent between this case and the

Seventh Circuit's decision in *Healthcare*. There the district court *granted* the defendant's first motion to dismiss, but concluded that the plaintiff's second amended complaint pleaded fraud sufficiently to meet the demands of Rule 9(b). By demanding an amended pleading to correct perceived deficiencies, the trial court established as complete a "record" as may be possible at the pleading stage. Thus, assuming a certified appeal on a "close question" is permissible, the extreme procedural unfairness that is present *in this case* would be prevented. Thus the ordinary routine of pleading practice will continue to be committed to the discretion of the district courts without disruption under the established jurisprudence of Rules 8, 9, 12(b)(6) and 15.

III.

THE TRIAL COURT HAS EXCLUSIVE DISCRETION TO PERMIT OR DENY AMENDMENTS.

The danger identified by Judge Ripple in dissent in *Healthcare* is made painfully obvious in this case. The problem with the court of appeals opinion is its failure to make reasonable inferences on behalf of petitioners. Whatever the court of appeals or this Court may think of the clarity, artfulness, obscurity or otherwise of the draftsmanship of the First Amended Complaint, plaintiffs alleged that WMX had an overcapacity of landfill capacity at the very time plaintiffs and the public at large believed a general shortage of such capacity existed. The briefing record in the trial court and the court of appeals provided additional indications, WMX, through public statements by officers, through public relations efforts, through its membership in and close association with defendant EIA, promoted and cultivated in the public mind and market the belief that a "crisis" existed. WMX's representative made similar misrepresentations *directly* to Williams and Dreiling and induced the sale of their business. WMX duty was to *correct* misinformation in the public

markets, not ride the wave. The Fifth Circuit never addresses issues related to defendants omissions to disclose risks associated with their landfill overcapacity. In petitioners view this reflects a narrow reading inconsistent with the obligation in a Rule 12(b)(6) motion to draw inferences in favor of the non-movant. Moreover, several *obiter dicta* statements in the account suggest that the court may have gone outside the pleading to punish the motives or strategy of the pleader. (App. A at 6a-8a).

The procedure followed is inconsistent with the proper allocation of responsibility between trial and appellate courts. Discretionary matters such as to the amendment of pleadings are reposed in the trial courts. *E.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971) ("[It] is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court.").[3] Dismissal without leave to replead is clearly disfavored and should not be countenanced.

The decision of the court of appeals in this case is contrary to its own precedent. Applicable Fifth Circuit precedent *restricts* the discretion of trial judges to deny pleading amendments and *requires* that such discretion be liberally exercised in favor of *granting* leave to amend. A leading Fifth Circuit case makes it clear that "discretion" in pleading matters must ordinarily be exercised in favor of amendments:

---

3. Rule 15(a) of the Federal Rules of Civil Procedure states:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

> In our review of the trial court's exercise of discretion, Rule 15(a), of course, provides the starting point. "Discretion" may be a misleading term, for Rule 15(a) severely restricts the judge's freedom, directing that leave to amend "shall be freely given when justice so requires". It evinces a bias in favor of granting leave to amend. The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading. *Thus, unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial.*

Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 596 (5th Cir. 1981) (emphasis added). *Dussouy* is consistent with the decisions of this Court.

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." . . . Rule 15(a) declares that leave to

> amend "shall be freely given when justice so requires"; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.

Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962) (citations omitted).

The opinion of the court of appeals never directly addresses these bedrock principles. Rather, in veiled and indirect fashion, but the court justifies its decision solely by the misleading statement that "Plaintiffs have failed to in two attempts to plead with particularity." (*See* App. A at pp. 1a-12a). As noted above, this language is misleading to the extent that it implies that deficiencies had been discerned in the proceedings of the trial court and left uncorrected. Rather, without reasoning or citation to authority, it seemingly holds that a party that exercises its lawful right to amend its complaint as of right under Rule 15(a) commits a procedural waiver of its right to seek leave to amend at a later time. This unsupported holding presents no justification for elimination of discretion ordinarily reposed in the trial court, and petitioners urge that no such justification exists.

The panel opinion seemingly invites this Court to rewrite the Rules of Civil Procedure to place additional disabilities on fraud claims. (App. at 5a-6a). In this regard it is inconsistent with Supreme Court authority. Its ruling harkens to the period before to the Federal Rules were promulgated when one misstep in the pleadings could doom a plaintiff's case. This outcome was specifically decried in *Foman*. As stated by Professors Wright and Miller:

> [D]ismissals for noncompliance with Rule 9(b) or refusals to grant leave to replead

> should be restricted to situations in which the trial court in the exercise of its discretion is convinced the pleader has had an opportunity to correct the defect but cannot or will not. This approach, coupled with a liberal amendment policy, will guarantee that there are a minimal number of purely technical pleading attacks under Rule 9(b) and that few non-meritorious dismissals result; at the same time it will preserve the rationale that underlies the Rule 9(b) requirement that fraud and mistake be pleaded with particularity.

5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1300 (2d ed. 1990 & Supp. 1996). This Court, in order to maintain uniformity of its decisions, must direct the lower courts to permit petitioners to amend their complaint so that justice may be done.

CONCLUSION

For the reasons given, petitioners Dennis Williams and Richard Dreiling respectfully request that this Court grant this petition for certiorari. So clear is this point and so grave the departure of the court of appeals from established practice, the matter is one that may not require any more than a summary order vacating the appellate judgment insofar as it limits the discretion with regard to repleading. Regardless of the level of attention given to the matter by the Court, petitioners request that the Court grant an order of certiorari directing the United States Court of Appeals for the Fifth Circuit to reverse or vacate its judgment either to dismiss the appeal and remand to the United States District Court for the Southern District of Texas for further proceedings consistent with the judgment and opinion of this Court.

Respectfully submitted,

DIANA E. MARSHALL
J. TYNAN KELLY
PAUL J. FRANZETTI
Counsel of Record
SCHECHTER & MARSHALL, L.L.P.
1111 Bagby, Suite 1950
Houston, Texas 77002
(713) 655-0300

BEN C. BROOCKS
H. VICTOR THOMAS
DAVID ANDIS
BROOCKS, BAKER
& LANGE, L.L.P.
808 Travis Street, Suite 1700
Houston, Texas 77002
(713) 222-1434

DONNA K. GRAY, P.C.
One Riverway, Suite 1400
Houston, Texas 77056
(713) 439-7444

Attorneys for Petitioners

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED APRIL 24, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20461

DENNIS WILLIAMS, RICHARD DREILING,

Plaintiffs-Appellees,

versus

WMX TECHNOLOGIES, INC. formerly known as Waste Management, Inc. and ENVIRONMENTAL INDUSTRY ASSOCIATIONS, formerly known as National Solid Waste Management Association; DEAN L. BUNTROCK,

Defendants-Appellants.

Appeals from the United States District Court
For the Southern District of Texas

Before HIGGINBOTHAM, DAVIS, and BARKSDALE, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This is a class action suit alleging fraud in the sale of securities. WMX, EIA, and Dean Buntrock bring this interlocutory appeal from the district court's denial of their motion to dismiss Williams and Dreiling's complaint. We find that the amended complaint failed to allege fraud with particularity, reverse the order of the district court, and remand with instructions to dismiss.

Appendix A

I.

In 1987, news services over much of the world followed the plight of a barge heaped with New York state garbage off the coast with no landfill willing to take its waste. This event seeded a public perception that the United States was running out of space to dispose of its trash. Much public discussion followed. Finally, on January 19, 1995, the *Wall Street Journal* published an article detailing the history of this "crisis," postulating that we were never really running out of disposal space. This article also attributed much of the media's attention about declining landfill space to large garbage companies willing to exploit public fear of a garbage crisis.

On February 24, 1995, Dennis Williams and Richard Dreiling filed this suit alleging that WMX, a national garbage hauling service, and its president, Dean Buntrock, defrauded the public, government agencies, and local trash haulers who sold out to WMX by perpetuating the "garbage crisis" myth. Plaintiffs also sought to represent a class of purchasers of "securities, including the common stock of WMX for a period beginning January 1, 1987, and ending December 31, 1993." The putative class has not been certified. Williams and Dreiling were co-owners of Texas Sanitation Industries, sold to WMX in exchange for WMX stock. On June 6, 1995, Williams and Dreiling filed an amended pleading, adding EIA, a trade group formed to lobby for the interest of the garbage companies, as a defendant and modifying its claims to allege violations of RICO and aiding and abetting a 10b-5 violation. Williams and Dreiling alleged that EIA was liable for the fraud committed by WMX because it is linked both operationally and financially with WMX and that it participated in disseminating false and misleading material in the market.

Appendix A

In their amended complaint, Williams and Dreiling alleged that during the time they were contemplating whether to sell TSI for stock, an employee of WMX, Lynn Lantrip, stated that: 1) there existed a shortage of landfill capacity; 2) TSI would soon have no place to dump the trash it hauled; 3) WMX could soon be unable to accept any trash hauled by TSI; and 4) WMX owned and controlled more landfill capacity than any other company in the United States. Their brief also alleged that WMX's January 1992 prospectus falsely stated that:

> Suitable sanitary landfill facilities have become increasingly difficult to obtain because of land scarcity, local resident opposition and expanding governmental regulation. The scarcity of sites and increased volume of wastes have resulted in more intensive use of existing sanitary landfill facilities. As its existing facilities become filled, the solid waste disposal operations of the Company are and will continue to be materially dependent on its ability to purchase, lease or obtain operating rights for additional sites and obtain the necessary permits from regulatory authorities to operate them. There can be no assurance that additional sites can be obtained or that existing facilities can continue to be operated. However, management believes that the facilities currently available to the Company are sufficient to meet the needs of its current operations for the foreseeable future.

Attached to the amended complaint were 62 newspaper articles

alleged to contain public misrepresentations by WMX and EIA, some of which were excerpted in the body of the amended complaint. Williams and Dreiling urged that these articles demonstrated that WMX and EIA conspired to perpetrate the "mass deception" that there was a garbage crisis.

The district court denied a motion to dismiss the amended complaint under Fed. R. Civ. P. 9(b) and 12(b)(6), and a motion to reconsider, but granted a request to certify the interlocutory ruling for appeal. Judge Hittner found that whether the pleading of fraud met the particularity requirement presented a close question. We granted the requested leave to appeal.

II.

The amended complaint alleged violations of RICO predicated on mail and wire fraud, misrepresentations in violation of 10b-5, and state law claims of fraud and negligent misrepresentation. We must decide if the amended complaint was detailed enough to survive the motion to dismiss, an attack leveled at all claims, resting as they do upon the same asserted "fraud".

Fed. R. Civ. P. 9(b) applies to securities fraud and RICO claims resting on allegations of fraud. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994) (securities fraud); *Tel-Phonic Serv., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1139 (5th Cir. 1992) (RICO). WMX contends that 9(b) also applies to the state law claims of common law fraud and negligent misrepresentation. Because Williams and Dreiling do not attempt to distinguish these claims in their brief, and because the state law claims rely upon the same misrepresentations as the federal claims, we do not distinguish

between them here. *See Shushany v. Allwaste, Inc.*, 992 F.2d 517, 520 n.5 (5th Cir. 1993). We see no principled reason why the state claims of fraud should escape the pleading requirements of the federal rules, and the parties have not urged a separate focus upon state law claims of negligent misrepresentation.

The elements of fraud include: 1) a misstatement or omission; 2) of material fact; 3) made with the intent to defraud; 4) on which the plaintiff relied; and 5) which proximately caused the plaintiff's injury. *Cyrak v. Lemon*, 919 F.2d 320 (5th Cir. 1990). Pleading fraud with particularity in this circuit requires "time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby." *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994); *see also Melder v. Morris*, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994); *Shushany v. Allwaste*, 992 F.2d 517, 520 (5th Cir. 1993).

As the Second Circuit has noted, articulating the elements of fraud with particularity requires a plaintiff to specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993). We agree with the Second Circuit's approach. This suit was filed prior to the effective date of the Private Securities Litigation Reform Act, and while its provisions do not apply, the Act adopted the same standard we apply today. *See* H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 41 (1995); 15 U.S.C. § 78u-4(b).

The cry of pleading technicalities must be put in perspective. The rules of civil procedure adopted in 1938 implemented a profound change in the role of pleading in defining issues for

trial. In the main, the complaint became an ignition point for discovery. Issues were to be "defined" by discovery, not pleading. Our reverential treatment of the large achievements of the 1938 rules may not have fully counted its price, or at least the price over time seems to have gone up as pretrial process dwarfs actual trials. We do not fully understand the extent of these difficulties or their cause. It does remain clear that ready access to the discovery engine all the while has been held back for certain types of claims. An allegation of fraud is one. Rule 9(b) demands a larger role for pleading in the pre-trial defining of such claims.

That said, the requirement for particularity in pleading fraud does not lend itself to refinement, and it need not in order to make sense. Directly put, the who, what, when, and where must be laid out *before* access to the discovery process is granted. So today we neither set springs for the unwary nor insist on "technical" pleading requirements. We remind that this bite of Rule 9(b) was part of the pleading revolution of 1938. In short, we apply the rule with force, without apology. At the same time, we read Rule 9(b) as part of the entire set of rules, including Rule 8(a)'s insistence upon "simple, concise, and direct" allegations. Relatedly, while 9(b) stands as an exception to an overarching policy of immediate access to discovery, it did not reflect a subscription to fact pleading.

The inferior courts have emphasized that Rule 9(b)'s ultimate meaning is context-specific. When a limitation period looms large and the context strongly suggests that claimed "fraud" walks close to non-actionable expression of opinion, 9(b) takes on especial force. Finally, we must not dim the beacon of Rule 8(f) that "all pleadings shall be construed as to do substantial justice." We must give a fair opportunity to plead.

Appendix A

A complaint can be long-winded, even prolix, without pleading with particularity. Indeed, such a garrulous style is not an uncommon mask for an absence of detail. The amended complaint here, although long, states little with particularity. Williams and Dreiling allege that the "fraud" was implemented by false statements in WMX's prospectus, its face-to-face negotiations for the purchase of competitors' companies, and in false disseminations to the market. First, they claim that a representative of WMX, Lynn Lantrip, made face-to-face misrepresentations to them at a meeting to discuss the sale of their trash hauling company to WMX. Second, they claim that WMX's prospectus contained misrepresentations, presumably in the only language from the prospectus included in the amended complaint. This is an excerpt from a section of the prospectus entitled "Risk Factors." The final basis for Williams and Dreiling's allegations of fraud is a collection of newspaper articles, few of which are excerpted in the complaint. We will consider each of these allegations for their particularization of fraud.

A. The Discussion with Lynn Lantrip

Williams and Dreiling claim that they sold their company in large part on the perception of a landfill crisis and misrepresentations made by Lynn Lantrip that encouraged this perception. The amended complaint does not state a place or time that these representations were made. WMX suggests a motive for Williams and Dreiling's apparent reluctance to be particular: because they received WMX stock on February 26, 1992, and this suit was filed on February 24, 1995, the allegedly fraudulent misstatements occurred outside the limitations period established in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). Because we do not reach the

question of limitations, we do not address WMX's assertion. At a minimum, Rule 9(b) requires that the plaintiff specify the particulars of "time, place, and contents of the false representations." *Tuchman*, 14 F.3d at 1068. The allegations of face-to-face fraudulent acts by Lantrip fail for lack of particularity.

B. The Prospectus

Williams and Dreiling broadly allege that WMX's prospectus, as excerpted in their complaint, contained fraudulent statements about the future of landfill availability. However, it is not clear from the amended complaint which assertions in the excerpted prospectus statement they are challenging as false. The amended complaint merely excerpts the prospectus and provides no analysis of its contents or falsity. On its face, the statement seems to say no more than the future of WMX as a waste disposal company is materially dependent on its ability to find space to dump its waste. The statement also says that new landfills have been hard to locate, but that WMX presently has sufficient facilities available for the disposal of waste. The language of the excerpt is equivocal, which is appropriate because the "risk factors" section of a prospectus is not intended to make promises or claims regarding the future, but is meant to warn investors of factors that can affect a company's future performance. Williams and Dreiling's lack of specificity as to which portion is false and why prevents this portion of the complaint from meeting the standard of pleading set out in Rule 9(b).

C. The Newspaper Articles

The allegations of fraud perpetrated in the press suffer from

the same deficiencies as Williams and Dreiling's other allegations. They do not attempt to parse the articles to demonstrate which statements were fraudulent and attributable to WMX, EIA, or Buntrock. Although newspaper articles attached to a pleading may be considered by this court, *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996), plaintiffs must also "set forth an explanation as to why the statement or omission complained of was false or misleading." *In re GlenFed, Inc., Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc).

The articles are referenced in a section of the complaint titled "The Myth is Perpetrated in the Marketplace," which reads:

> WMX and its trade association the NSWMA were disseminating the false and fraudulent myth of a landfill crises [sic] in a huge number of ways and means. Attached hereto as Exhibit "1" are excerpts of news articles that either quote WMX and/or NSWMA, or, on information and belief, rely on information supplied by these defendants.

The failure of this section of the complaint to identify specific statements made by any of the defendants is fatal to Williams and Dreiling's action. *See generally, Hershfang v. Citicorp*, 767 F.Supp. 1251, 1259 (S.D.N.Y. 1991) (decrying the use of "a patchwork of newspaper clippings," to establish a claim of securities fraud).

These vague pleadings illustrate the practical basis for the requirement that a plaintiff point to specific statements made by the defendants. Many of the newspaper excerpts attached to

Appendix A

Williams and Dreiling's complaint quote the NSWMA, the predecessor to the EIA, without specifying who gave information to the paper. These excerpts, standing alone, cannot satisfy the "who, what, when, where, and how" required by Rule 9(b). *Melder v. Morris*, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994) (citing *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.), *cert. denied*, 498 U.S. 941 (1990)). *San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris Co.*, 75 F.3d 801 (2d Cir. 1996), is not to the contrary. In *Philip Morris*, the court found that unattributed newspaper statements were actionable where the article contained numerous other attributed quotes. *Id.* at 810. Here, the article excerpts contain no quotes from named officers or directors of WMX.

Many of the other article excerpts cited by Williams and Dreiling are along the lines of the one from the August 30, 1989, *Houston Post*. The excerpt of an article titled "Waste firm, 17 subdivisions sharing profits from trash recycling program" reads:

> The program to encourage recycling not only gives Waste Management a cash dividend — the other 50 percent from the sale of recyclables — but saves valuable space in the company's landfills.

This excerpt discloses nothing about a statement by an employee of WMX or EIA. Indeed, it is unclear what fraudulent assertion Williams and Dreiling are challenging. The only statement that can be construed as commenting upon landfill availability is that space in landfills is valuable, hardly actionable.

Other articles are just as innocuous. It is unclear what purpose Williams and Dreiling have in mind when they cite

articles that attribute to the NSWMA the notion that, although ensuring adequate garbage disposal now ranks third on a list of problems facing local officials, it had previously been ranked second. Similar infirmities pervade all of the articles attached to the complaint. This lack of specificity stands in contrast to the widespread nature of the conspiracy that Williams and Dreiling attempt to allege.

Excerpts of the articles that appear in the body of the complaint are unaccompanied by specific allegations. No attempt is made to isolate statements and particularize their falsity. In a section of the complaint titled "WMX/NSWMA Spread the Myth of a Landfill Crisis," Williams and Dreiling cite a *Wall Street Journal* article asserting that "Big trash-handling companies certainly knew there was no landfill crisis but helped spread the word of one anyway. . . ." Complaint, at 8. This section of the complaint continues, noting that the article stated that:

> Dean L. Buntrock, chairman and chief executive officer of WMX Technologies, Inc., had loaded up on dump space in the 1970s and 1980s. He had also started a trade group and lobbying arm, the National Solid Waste Management Association. After the Mobro voyage, the group was widely quoted asserting that dump capacity was shrinking.
>
> . . .
>
> WMX was . . . telling customers as recently as 1993: "This nation is quickly running out of places to dispose of trash."

These excerpts are insufficient to put any of the defendants on notice as to which of their assertions are challenged. Indeed the excerpts do not quote a defendant, they merely say that the defendants were widely quoted or paraphrase previous statements.

III.

We find that the amended complaint failed to state claims of fraud with the particularity required by Fed. R. Civ. P. 9(b). Plaintiffs have failed in two attempts to plead with particularity. Their efforts have been carefully reviewed by an able district judge. The order of the district court denying the defendants' motion to dismiss is REVERSED and this case is REMANDED to the district court with instructions to dismiss.

REVERSED and REMANDED with instructions.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED MARCH 5, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-95-0573

DENNIS WILLIAMS, RICHARD DREILING, et al,

Plaintiffs,

v.

WMX TECHNOLOGIES, INC., f/n/a Waste Management, Inc., and ENVIRONMENTAL INDUSTRY ASSOCIATIONS, f/n/a National Solid Waste Management Association, and DEAN BUNTROCK,

Defendants.

ORDER

Pending before the Court are the Motions to Reconsider or in the Alternative, to Certify for Interlocutory Appeal (Documents ##58, 61) filed by defendants Environmental Industry Associations, WMX Technologies, and Dean Buntrock. Having considered the motions, the submissions and the applicable law, the Court determines that the motions to reconsider should be denied and the motions to certify for interlocutory appeal should be granted.

On December 11, 1995, this Court denied defendants' multiple motions to dismiss. The Court entered the order after

considering voluminous submissions on file and after a hearing conducted before the Court on December 1, 1995. The Court denied the motions to dismiss, finding that plaintiffs' claims were not time barred, and that plaintiffs had alleged sufficient facts to satisfy the heightened pleading requirements of Fed. R. Civ. P. 9(b).

Pursuant to 28 U.S.C. § 1292(b), the Court may certify an order for interlocutory appeal where (1) the order involves controlling questions of law as to which there is substantial ground for difference of opinion and (2) where an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b) (1993).

In *In re Healthcare Corp.*, No. 95-2072, 1996 WL 26624 (7th Cir. Jan. 24, 1996), the defendants in a securities fraud case moved to dismiss plaintiffs' complaint for failure to meet the particularity requirements under 28 U.S.C. § 1292(b). The district court denied the defendants' motion, but certified its order stating that "the case before [the court] presented a 'close question,' and because 'a massive amount of discovery was lurking in [the] case.' " *Id.* at *2. The Seventh Circuit granted the defendants' motion to appeal the interlocutory order and, after reversing the district court's order, dismissed the plaintiff's claims. *Id.*

Likewise in the instant case, the issue of whether plaintiffs have satisfied the pleading requirements of 9(b) is a close question. Furthermore, similar to *In re Healthcare*, this case is a potential class action securities fraud case that will involve lengthy litigation and vast amounts of discovery and expenditures.

Appendix B

The Court finds that the issues in this case involve controlling questions of law as to which there is substantial ground for difference of opinion. Additionally, since the ruling at issue involves a motion to dismiss filed by defendants, an immediate appeal would materially advance the termination of the litigation. Therefore, pursuant to 28 U.S.C. § 1292(b), the Court certifies for interlocutory appeal the order denying plaintiffs' motions to dismiss.

Therefore, based on the foregoing, the Court

ORDERS that the Motion to Reconsider is DENIED and the Motion to Certify for Interlocutory Appeal is GRANTED. The Court further ORDERS that a timely application by defendants for an appeal shall stay all proceedings in this case until the Fifth Circuit Court of Appeals has taken final action with respect to the application and any appeal.

SIGNED at Houston, Texas, on this the 5 day of March, 1996.

s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED DECEMBER 12, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-95-0573

DENNIS WILLIAMS, RICHARD DREILING, et al,

Plaintiffs,

v.

WMX TECHNOLOGIES, INC., f/n/a Waste Management, Inc., and ENVIRONMENTAL INDUSTRY ASSOCIATIONS, f/n/a National Solid Waste Management Association, and DEAN BUNTROCK,

Defendants.

ORDER

Pending before the Court are the Motions to Dismiss (Documents #22, 23) filed by defendants. Having considered the motions, submissions, and the arguments of counsel at a hearing conducted before the Court on December 1, 1995, the Court

ORDERS that the Motions to Dismiss (Documents #22, 23) are DENIED.

Appendix C

SIGNED at Houston, Texas, on this the 11 day of December, 1995.

s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX D — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 22, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20461

DENNIS WILLIAMS; RICHARD DREILING

Plaintiffs - Appellees

v.

WMX TECHNOLOGIES INC, formerly known as Waste Management Inc and ENVIRONMENTAL INDUSTRY ASSOCIATIONS, formerly known as National Solid Waste Management Association; DEAN L BUNTROCK

Defendants - Appellants

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 4/24/97, 5 Cir., 1997, F.3d)

Before HIGGINBOTHAM, DAVIS, AND BARKSDALE, Circuit Judges.

Appendix D

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ illegible
United States Circuit Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED JUNE 6, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-95-0573

DENNIS WILLIAMS, RICHARD DREILING, et al,

Plaintiffs,

v.

WMX TECHNOLOGIES, INC., f/n/a Waste Management, Inc., and ENVIRONMENTAL INDUSTRY ASSOCIATIONS, f/n/a National Solid Waste Management Association, and DEAN BUNTROCK,

Defendants.

ORDER

As the mandate has issued from the United States Court of Appeals for the Fifth Circuit, remanding this case with instructions to dismiss all claims, this Court

ORDERS that this case is DISMISSED WITH PREJUDICE.

SIGNED at Houston, Texas, on the 5 day of June, 1997.

s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED JULY 15, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIV. NO. 95-0573

DENNIS WILLIAMS, RICHARD DREILING, ET AL.

V.

WMX TECHNOLOGIES, INC., ET AL.

ORDER

Pending before the Court is the Motion to Alter or Amend the Order of Dismissal (Document #84) filed by plaintiffs. After considering the motion, submissions, and the applicable law, the Court determines that the motion should be denied.

On June 5, 1997, this Court entered an Order dismissing this case with prejudice pursuant to the mandate issued by the United States Court of Appeals for the Fifth Circuit in *Williams v. WMX Technologies*, 112 F.3d 175 (5th Cir. 1997). Plaintiffs now seek an amendment of that order on several grounds.

Plaintiffs first contend that this Court should wholly reverse its order dismissing this case and abate this action pending the outcome of their Petition for Writ of Certiorari to the United States Supreme Court. This Court has no authority to stay the order entered by the Fifth Circuit mandating that this case be dismissed. Rather, a motion filed with the Court of Appeals under

F.R.A.P. 41 is the proper avenue for plaintiffs to obtain a stay of that court's. Therefore, plaintiffs' first ground for relief is denied.

Plaintiffs ask this Court to reverse its order dismissing their state law claims with prejudice. They contend that the Court of Appeals' order applied only to their federal claims, and that Fed. R. Civ. P. 9(b) has no application in this case in determining whether their state law claims have been sufficiently plead. In its Order, the Court of Appeals expressly declined to distinguish between plaintiffs' federal and state claims for the purposes of analyzing whether plaintiffs had complied with Rule 9(b).

> We see no principled reason why the state claims of fraud should escape the pleading requirements of the federal rules, and the parties have not urged a separate focus upon state law claims of negligent misrepresentation.

112 F.3d at 177. Accordingly, it is clear that the Court of Appeals' order that plaintiffs' claims should be dismissed included a finding that both the federal and state claims were insufficiently pleaded. An order from this Court restricting dismissal to plaintiffs' federal claims to allow plaintiffs to assert those claims in state court would be in direct contravention of the Fifth Circuit's mandate. Thus, plaintiffs' second ground for relief is denied.

In their final ground for relief, plaintiffs request that this Court amend its order of dismissal and allow them to replead their federal claims to remedy any deficiencies under Rule 9(b). Based on the responses filed by the defendants in this case, it is clear that plaintiffs sought this same relief before the Court of

Appeals. Specifically, plaintiffs argued in their appellate briefs that if the Court of Appeals was inclined to dismiss their claims, they should be allowed to replead to comply with Rule 9(b). Noting that the plaintiffs had already "failed in two attempts to plead with particularity as required by Rule 9(b)", the Court ordered that this Court dismiss their claims.

When plaintiffs petitioned the Court of Appeals for rehearing, they again argued that the Court of Appeals should grant them a dismissal without prejudice and allow them to replead their claims. Because the Court of Appeals denied the petition for rehearing, this Court may not now grant plaintiffs the same relief they sought, but were denied, from the Court of Appeals. *See Gegenheimer v. Galan*, 920 F.2d 307, 309 (5th Cir. 1991) ("On remand the district court must comply with the mandate of the Court of Appeals, and may not revisit any issues that the Court of Appeals expressly or impliedly disposed of in its decision"). Therefore, the Court

ORDERS that the Motion to Alter or Amend the Order of Dismissal is DENIED.

Signed at Houston, Texas on the 14 day of July, 1997.

s/ David Hittner
DAVID HITTNER
United States District Judge

Supreme Court, U.S.
FILED
OCT 6 1997
CLERK

(2)

No. 97-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DENNIS WILLIAMS, ET AL.,

Petitioners,

v.

WMX TECHNOLOGIES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT BRIEF IN OPPOSITION

NICHOLAS J. ETTEN*
PETER G. RUSH
MAUREEN WARD KIRBY
MARC DOUGLAS FISHER
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street
Suite 3000
Chicago, IL 60602-4207
(312) 372-1121

LYNNE LIBERATO
HAYNES AND BOONE, L.L.P.
4300 First Interstate Bank Plaza
1000 Louisiana Street
Houston, TX 77002-5012
(713) 547-2000

Counsel for Respondents Waste Management, Inc. and Dean Buntrock

JOSEPH M. HASSETT*
GEORGE H. MERNICK, III
ALBERT W. TURNBULL
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5643

DAVID J. BECK
L. NICOLE BATEY
BECK, REDDEN & SECREST
1331 Lamar, Suite 1570
1331 Houston, TX 77101-2002
(713) 659-8140

Counsel for Respondent Environmental Industry Associations

* Counsel of Record

28 pp

QUESTION PRESENTED

Whether the Court of Appeals erred in exercising its discretion to accept an interlocutory appeal under 28 U.S.C. § 1292(b) and in failing to order the District Court to grant Petitioners leave to file a third complaint.

RULE 29.6 STATEMENT

Respondent Waste Management, Inc. (formerly known as WMX Technologies, Inc.) has two nonwholly owned subsidiaries: Waste Management International P.L.C. and Wheelabrator Technologies Inc.; Waste Management Inc. has no parent companies.

Respondent Environmental Industry Associations (formerly known as National Solid Waste Management Association) has no parent companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
COUNTERSTATEMENT	2
REASONS FOR DENYING THE WRIT	9
I. THE FIFTH CIRCUIT OPINION OF WHICH PETITIONERS SEEK REVIEW DID NOT ADDRESS THE REPLEADING ISSUE	10
II. THE ISSUE OF DISMISSAL WITH PREJUDICE WAS AN ISSUE FAIRLY WITHIN THE CERTIFIED ORDER OF THE DISTRICT COURT	12
III. THE DISTRICT COURT AND THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT THE CERTIFIED ORDER INVOLVED A CONTROLLING QUESTION OF LAW	16
IV. THE COURT OF APPEALS' JURISDICTION EXTENDS TO THE ISSUE OF AMENDMENT	19
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES:

Abrams v. *Occidental Petroleum Corp.*, 450 F.2d 157 (2d Cir. 1971) 21
Aldridge v. *Lily-Tulip, Inc.*, 714 F. Supp. 906 (S.D. Ga. 1990), *aff'd in part & rev'd in part*, 953 F.2d 587 (11th Cir. 1992) 16, 21
Aldridge v. *Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 953 F.2d 587 (11th Cir. 1992) 17
In re Cement Antitrust Litig., 673 F.2d 1020 (9th Cir. 1982), *aff'd for lack of a quorum*, 459 U.S. 1190 (1983) 16
Foman v. *Davis*, 371 U.S. 178 (1962) 20
Gegenheimer v. *Galan*, 920 F.2d 307 (5th Cir. 1991) 11
In re Healthcare Compare Corp. Sec. Litig., 75 F.3d 276 (7th Cir. 1996) ..... *passim*
International Soc'y for Krishna Consciousness v. *Air Canada*, 727 F.2d 253 (8th Cir. 1984) 18
MGPC, Inc. v. *Dep't of Energy*, 763 F.2d 422 (Temp. Emer. Ct. App. 1985) 20
Nguyen v. *United States*, 792 F.2d 1500 (9th Cir. 1986) 10
S.B.L. v. *Evans*, 80 F.3d 307 (8th Cir. 1996) 18
Sokaogan Gaming Enterprise Corp. v. *Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656 (7th Cir. 1996) 16
Shushany v. *Allwaste, Inc.*, 992 F.2d 517 (5th Cir. 1993) 16
United States v. *Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995) 21
Wells Fargo & Co. v. *Taylor*, 254 U.S. 175 (1920) 10
Yamaha Motor Corp. v. *Calhoun*, 116 S. Ct. 619 (1995) 12

STATUTES:

26 U.S.C. § 2106 ..... 20, 21
28 U.S.C. § 1292(b) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

RULES:

Fed. R. Civ. P. 9(b) ..... *passim*
Fed. R. Civ. P. 12(b)(6) 5
Fed. R. Civ. P. 15(a) 1

LEGISLATIVE MATERIALS:

S. Rep. No. 2434, 85th Cong., 2d Sess. 2 (1958)..... 14

OTHER AUTHORITY:

Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607 (1975) 12, 14
15A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3901 (2d ed. 1992)..... 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-333

DENNIS WILLIAMS, ET AL.,

Petitioners,

v.

WMX TECHNOLOGIES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

JOINT BRIEF IN OPPOSITION

INTRODUCTION

The Petition rests on its opening assertion that the Fifth Circuit "has denied petitioners the ordinary right to replead to correct pleading requirements that were imposed on petitioners *for the first time* at the appellate level." Pet. at 2 (emphasis in original). This premise, woven throughout the Petition, is inaccurate. In the District Court, Petitioners amended their pleading "once as a matter of course" under Rule 15(a). Later, after Respondents moved to dismiss that amended pleading, the District Court invited Petitioners to again amend "in order to plead your cause with more specificity." Petitioners declined. The District Court denied Respondents' motions to dismiss, but granted their motion for interlocutory review. On appeal, the Fifth Circuit did

not impose new and onerous pleading requirements. Instead, the Court of Appeals addressed the pervasive Rule 9(b) deficiencies in Petitioners' allegations of fraud. Petitioners concede (as they must) that these Rule 9(b) pleading requirements were "well understood." Pet. at 12.

In providing for interlocutory review of the Rule 9(b) sufficiency of Petitioners' pleading, both the District Court and the Fifth Circuit recognized that appellate review might "materially advance the ultimate termination of the litigation." The appeal was not an academic exercise on the fundamentals of Rule 9(b) pleading. It was what everyone understood it to be—a substantive review of the Rule 9(b) sufficiency of the pleading which Petitioners had embraced as their operative complaint. Petitioners understood they would be bound by the results of that review, and they are.

During the course of the interlocutory appeal, Petitioners expressly requested another chance to replead, spelling out for the Court of Appeals all of the matters they would include in a third pleading. No reason exists to upset the Fifth Circuit's exercise of its discretion in failing to grant Petitioners' request for further repleading.

COUNTERSTATEMENT

District Court Proceedings Involving the Motions to Dismiss

In the District Court, Respondents Dennis Williams and Richard Dreiling filed what was essentially a fraud-on-the-market, class action "securities fraud case." Pet. at 3. The Defendants were WMX Technologies, Inc. ("WMX"), its Chief Executive Officer Dean Buntrock ("Buntrock") and Environmental Industry Associations ("EIA"), an association engaged in lobbying, educational and informational activities on behalf of the waste services industry. The Amended Complaint alleged that

together, the three Defendants engaged in a massive fraud over seven years from 1987 through 1993. The Amended Complaint asserted that the Defendants "planned and implemented" a scheme "to convince the American public that the country was running out of [landfill] space" and that there was a national landfill capacity "crisis." Am. Compl. at ¶ 11. According to Williams and Dreiling, "[t]he gist of Plaintiffs' case is that Defendants together engaged in a prolonged fraudulent scheme to brainwash the public into believing that a 'garbage crisis' or 'landfill crisis' existed." Plaintiffs' Response to EIA's Motion to Dismiss at 5-6.

Williams and Dreiling sought to represent a class that included tens (if not hundreds) of thousands of purchasers of WMX stock over a seven-year period, and to recover class-wide damages of "several hundred million dollars." The District Court described the case as a potential "monster." Tr. of 12/1/95 Hrg. at 64-65.

Williams and Dreiling filed their original Complaint on the last business day before the expiration of the three-year statute of repose for the securities fraud claims. That eight-page Complaint, which failed to name EIA as a defendant, essentially alleged that WMX and Buntrock "engaged in a scheme to cause and permit the public issuance of false and misleading statements that a landfill capacity shortage and disposal crisis existed in the United States," and that "an employee of WMX [falsely] communicated to Plaintiffs . . . that there existed a shortage of landfill capacity." Compl. at ¶ 11. The Complaint alleged little else. There were no particularized allegations of any class-wide misrepresentations.

Williams and Dreiling concede that after filing the Complaint, they deliberately refrained from serving the summons and Complaint in order to conduct a 103-day "investigation into the matters set forth in the complaint" to search for "the facts" for their fraud allegations. Plaintiffs' Motion To Extend Time for Rule 26 Compliance With Matters in Court's Order for Conference at 2;

Plaintiffs' Motion To Extend Time for Service Pursuant to F.R.C.P. 4(m) and Motion for Alternative Service Pursuant to Texas Rule of Civil Procedure 106(b) at 1-2. More than three months after beginning the litigation, Williams and Dreiling filed and served the Amended Complaint.

The Amended Complaint greatly expanded the pleading (from eight pages and 22 paragraphs to 23 pages and 56 paragraphs). EIA, for the first time, was named as a defendant. The Amended Complaint contained four counts: securities fraud under Section 10(b) and Rule 10b-5; RICO violations; common-law fraud and civil conspiracy; and negligent misrepresentation.

The Amended Complaint alleged that in 1992 Williams and Dreiling sold their waste hauling business, Texas Sanitation Industries, Inc. ("TSI"), to WMX in exchange for shares of WMX common stock. Thereafter, the market price of WMX's stock declined. Williams and Dreiling claimed that WMX, Buntrock and EIA artificially inflated the price of WMX stock by convincing the American public that a national landfill crisis existed, that a national shortage of landfill capacity was occurring and that the country was running out of space to dispose of its garbage. Williams and Dreiling describe this as the "mass deception." Am. Compl. at ¶ 11.

Appended to the Amended Complaint were 28 pages of exhibits consisting of excerpts from 62 different news articles spanning a seven-year period. The Amended Complaint did not analyze, distinguish, or, with minor exception, even mention the contents of these 62 articles (apparently leaving that tedium to the federal courts). Nevertheless, Williams and Dreiling asserted that these news stories, when lumped together, somehow demonstrated that WMX and EIA were "disseminating the false and fraudulent myth of a landfill crisis in a huge number of ways and means." Am. Compl. at ¶ 15.

WMX and Buntrock, on one hand, and EIA on the other, filed separate motions to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6). A principal basis of the motions was the failure of each of the four counts of the Amended Complaint to plead fraud with the particularity required by Rule 9(b). In their motion, WMX and Buntrock explicitly requested that "the motion be granted and that the Amended Complaint be dismissed *with prejudice*." (emphasis added.)

Prior to the District Court's ruling on the adequacy of the Amended Complaint, Williams and Dreiling repeatedly represented to the District Court that additional amendments would be filed "promptly." Contrary to these representations, Williams and Dreiling never sought leave to amend their Amended Complaint. Indeed, at the hearing on the motions to dismiss, Williams and Dreiling declined an opportunity to replead and elected to stand on their Amended Complaint. The District Court specifically asked counsel for Williams and Dreiling "[a]re you going to amend your [Amended Complaint] in order to plead your causes with more specificity." Counsel responded in part: "[w]e had hoped to do it at a later time after discovery and we do believe that our complaint at this time is sufficient as to specificity." The District Court then inquired: "Do you think your allegations for fraud are sufficient under the rules." Counsel responded: "Yes, Your Honor. I think under [Rule] 9(b) they are sufficient as alleged . . . ." Tr. of 12/1/95 Hrg. at 5.

The District Court denied the motions to dismiss without opinion. Shortly thereafter, the District Court certified for interlocutory review its order that denied the motions to dismiss. The District Court harbored serious doubt about the adequacy of the Amended Complaint. In certifying its order for interlocutory review, the District Court held that "the issues in this case involve controlling questions of law on which there is substantial

ground for difference of opinion" and that "an immediate appeal would materially advance the termination of the litigation." Pet. App. at 15a. The District Court also deemed an interlocutory appeal desirable because the legal sufficiency of the Amended Complaint was "a close question" and that the case would "involve lengthy litigation and vast amounts of discovery and expenditures." *Id.* at 14a.

Proceedings in the Court of Appeals

A three-judge panel of the Fifth Circuit (the motions panel) unanimously granted Defendants' petitions for permission to proceed with an interlocutory appeal of the order denying the motions to dismiss. A separate Fifth Circuit panel then considered the merits, electing not to disturb the decision of the motions panel. The merits panel concluded that "the amended complaint failed to state claims of fraud with the particularity required by Fed. R. Civ. P. 9(b)." Pet. App. at 12a. In its detailed review of the Amended Complaint, the Fifth Circuit found that the "amended complaint . . . although long, states little with particularity." *Id.* at 7a. It noted that oral misrepresentations supposedly made to Williams and Dreiling by a WMX employee were not accompanied by requisite descriptions of the time and place of the purported misstatements. *Id.* at 7a-8a. Likewise, with respect to excerpts from a WMX prospectus that were quoted at length in the Amended Complaint, the Fifth Circuit concluded that "Williams and Dreiling's lack of specificity as to which portion is false and why prevents this portion of the complaint from meeting the standard of pleading set out in Rule 9(b)." *Id.* at 8a.

The Fifth Circuit further held that the 62 newspaper clippings attached to the Amended Complaint did little or nothing to satisfy Rule 9(b)'s specificity requirements. The pleading deficiencies relating to these articles included: (a) the failure to "attempt to parse the articles to demonstrate which statements were fraudulent and attributable to [which defendants]," *id.* at 9a; (b) the

failure to specify "who gave information to the paper," *id.* at 10a; (c) the observation that many of the articles are simply "innocuous," *id.*; and (d) the failure of the Amended Complaint to "isolate statements [in the articles] and particularize their falsity." *Id.* at 11a.

In their Court of Appeals brief, Williams and Dreiling asked that any dismissal be with leave to replead, and presented several pages of "additional factual matters" which they claimed to be prepared to add to their pleading if they were granted leave to amend. C.A. Br. at 1-3, 15-17.

The operative portion of the Fifth Circuit opinion ordering dismissal simply stated:

> Plaintiffs have failed in two attempts to plead with particularity. Their efforts have been carefully reviewed by an able district judge. The order of the district court denying defendants' motion to dismiss is REVERSED and this case is REMANDED to the district court with instructions to dismiss.

Pet. App. at 12a. After the Fifth Circuit rendered its opinion, Williams and Dreiling filed a Petition For Rehearing and a Suggestion For Rehearing En Banc, both of which questioned whether the Fifth Circuit had instructed the District Court to dismiss the Amended Complaint with prejudice and without leave to amend. In these papers, Williams and Dreiling also asked the Fifth Circuit for leave to replead. Both the Suggestion for Rehearing En Banc and the Petition for Rehearing were denied without comment.

Although Petitioners now contend that the Fifth Circuit's opinion specifically directed the District Court to dismiss the Amended Complaint with prejudice and without leave to amend, in their Petition for Rehearing Williams and Dreiling asserted that the Fifth Circuit's "[o]pinion is unclear, however, as to whether Plaintiffs will be permitted to request leave of the district court to amend their complaint to meet the deficiencies pointed

out by the court." Pet. for Reh'g at 1. Their Petition for Rehearing went on to proffer seven more pages of "matters" that they contend could be included in further pleading amendments. Pet. for Reh'g at 6-13. The Fifth Circuit had a full opportunity to consider those additional allegations. These "facts," however, failed to save the case of Williams and Dreiling.

After remand, Williams and Dreiling then told the District Court that it was authorized to grant them leave to amend because the Fifth Circuit did not order the dismissal of the Amended Complaint with prejudice. Williams and Dreiling advised the District Court as follows:

> [T]he order of the Fifth Circuit does not specifically state that the Plaintiffs' case is to be dismissed *with prejudice*. It only states that the case is to be dismissed. In these circumstances, the District Court should not presume that the dismissal should be done with prejudice, but rather should presume that the dismissal should be done without prejudice. Because the order of the Fifth Circuit is silent on this issue, this court should . . . grant Plaintiffs' leave to amend their complaint so that the Plaintiffs will have at least on [sic] opportunity to cure the deficiencies found by the Fifth Circuit. . . . [I]n these circumstances, this Court ought to grant Plaintiffs' leave to amend their complaint before their case is finally dismissed. There is nothing in the Fifth Circuit's order which prohibits this Court from doing so.

Plaintiffs' Motion to Alter or Amend the Order of Dismissal at 2.

As the above passage demonstrates, depending upon the circumstances, the court and the relief being sought, Williams and Dreiling interpret the Fifth Circuit's opinion in completely contradictory ways. On one hand, they claim that the Fifth Circuit ordered the District Court to dismiss the Amended Complaint with prejudice.

On the other hand, they insist that the Fifth Circuit did no such thing. Williams and Dreiling apparently feel strongly both ways. These conflicting interpretations of the same Fifth Circuit opinion establish that the opinion has little (if any) application beyond the four corners of the Amended Complaint at issue. This renders Supreme Court intervention inappropriate.

Proceedings in the District Court After Remand

After the mandate issued from the Fifth Circuit, the District Court entered an order dismissing the Amended Complaint with prejudice. The District Court's order states:

> As the mandate has issued from the United States Court of Appeals for the Fifth Circuit, remanding this case with instructions to dismiss all claims, this Court
>
> ORDERS that this case is DISMISSED WITH PREJUDICE.

Pet. App. at 20a. Williams and Dreiling then moved to amend that order, requesting, *inter alia*, that the District Court permit them to further amend their Amended Complaint. In a three-page ruling, the District Court denied that motion. *Id.* at 21a-23a. Williams and Dreiling never appealed either the District Court's order dismissing the Amended Complaint with prejudice or the District Court's further order denying their request to amend the Amended Complaint.

REASONS FOR DENYING THE WRIT

According to the various arguments advanced by Williams and Dreiling before this Court and the lower courts, one of two different situations exists. Either (1) the Fifth Circuit never ruled—expressly or impliedly—on the repleading issue; or (2) the rulings of the Fifth Circuit amounted to an instruction that the District Court dismiss the Amended Complaint with prejudice and without leave to amend. First, Williams and Dreiling

bypassed the perfect vehicle to review the propriety of the judgment dismissing the Amended Complaint with prejudice when they failed to appeal the District Court's entry of the judgment. Second, the Fifth Circuit opinion is limited to a single case specific issue: whether the Amended Complaint complied with the particularity requirements of Rule 9(b). Supreme Court review is not appropriate in these circumstances.

I. THE FIFTH CIRCUIT OPINION OF WHICH PETITIONERS SEEK REVIEW DID NOT ADDRESS THE REPLEADING ISSUE

All parties agree that the Fifth Circuit never expressly instructed the District Court to dismiss the Amended Complaint with prejudice. The proposition that an appellate mandate silent on the issue of repleading affords the District Court the discretion to permit an amendment finds support in the cases of *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175, 181-82 (1920) (district court order overruling a demurrer reversed by circuit court) and *Nguyen* v. *United States*, 792 F.2d 1500, 1503 (9th Cir. 1986). If the Fifth Circuit mandate truly was "opaque" as Petitioners claims (Pet. at 10), then the repleading issue was one for the District Court. Indeed, Williams and Dreiling urged that interpretation of the mandate in the District Court.

Upon remand and after the District Court dismissed the Amended Complaint with prejudice, Williams and Dreiling sought leave to amend their Amended Complaint. In their Motion to Alter or Amend the Order of Dismissal filed with the District Court, Williams and Dreiling asserted:

> [T]he order of the Fifth Circuit does not specifically state that the Plaintiffs' case is to be dismissed *with prejudice*. It only states that the case is to be dismissed. . . . Because the order of the Fifth Circuit is silent on this issue, this Court . . . should be [sic] grant Plaintiffs leave to amend their Complaint so that the Plaintiffs will have at least on [sic] oppor-

> tunity to cure the deficiencies found by the Fifth Circuit.

Plaintiffs' Motion to Alter or Amend the Order of Dismissal at 2 (emphasis in original). The District Court rejected their position. It reasoned that the Fifth Circuit had ruled on the repleading issue, and it quoted *Gegenheimer* v. *Galan*, 920 F.2d 307, 309 (5th Cir. 1991), for the proposition that "'the district court . . . may not revisit any issues that the Court of Appeals expressly or impliedly disposed of in its decision.'" Pet. App. at 23a.[1]

If, as Williams and Dreiling argued below, the Fifth Circuit never ordered the District Court to dismiss the Amended Complaint with prejudice, then the "error" about which they now complain (namely the denial of their request to amend) was committed by the District Court, not the Fifth Circuit.[2] As a consequence, any error committed by the District Court in entering the judgment dismissing this case with prejudice and denying leave to amend could have and should have been appealed to the Fifth Circuit. In such an appeal, all of the claimed confusion caused by the "opaque . . . language" (Pet. 10) could have been cleared-up by the court best suited to do so—the Fifth Circuit. Williams and

---

[1] Although WMX and Buntrock acknowledged that "the mandate did not specify whether the dismissal would be with or without prejudice," they did argue that "the clear intent of the Fifth Circuit" was to preclude any further amendment of the Amended Complaint. WMX's and Buntrock's Reply in Opposition to Plaintiffs' Motion to Alter or Amend at 8. EIA advocated a similar position before the District Court. EIA's Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend Order of Dismissal at 6-8.

[2] Indeed, language found in the Petition suggests Williams and Dreiling believe it was the District Court that erred. "In summary, the Fifth Circuit's disposition *was understood* by the district court to require dismissal of petitioners' claims with prejudice and to require denial of plaintiffs' motion for opportunity to replead." Pet. at 10 (emphasis added).

Dreiling never appealed the District Court's order dismissing the Amended Complaint with prejudice. Williams and Dreiling cannot raise that challenge. Not here. Not now.

Perhaps most importantly, the vacillating positions advocated by Williams and Dreiling on the implications of the Fifth Circuit opinion belie Petitioner's claim that the opinion will serve as some sort of watershed on the repleading issue. *See* Pet. at 3 ("A precedent that denies plaintiffs such fundamental procedural rights, if allowed to stand, would alter federal pleading and motion practice in a manner contrary to the clear intent of the Federal Rules of Civil Procedure"). The Fifth Circuit's opinion does not present the repleading issue with the clarity necessary to support this Court's grant of certiorari.

II. THE ISSUE OF DISMISSAL WITH PREJUDICE WAS AN ISSUE FAIRLY WITHIN THE CERTIFIED ORDER OF THE DISTRICT COURT

Citing 28 U.S.C. § 1292(b), Williams and Dreiling contend that the Fifth Circuit lacked the jurisdictional authority to reach the issue of whether a dismissal of the Amended Complaint ought to be with prejudice. Petitioners assert that under Section 1292(b), appellate jurisdiction extends only to " 'any issue fairly included within the certified order' " Pet. at 11 (quoting *Yamaha Motor Corp.* v. *Calhoun*, 116 S. Ct. 619, 623 (1995)). According to the quoted authority, under Section 1292(b), a Court of Appeals' "scope of review includes *all issues material to the order in question.*" *Yamaha Motor*, 116 S. Ct. at 623 (quoting Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 628-629 (1975)) (emphasis added; brackets appearing in *Yamaha Motor* omitted).

In its entirety, the certified order provided:

> Pending before the Court are the Motions to Dismiss (Documents #22, 23) filed by defendants. Having considered the motions, submissions, and the arguments of counsel at a hearing conducted before the Court on December 1, 1995, the Court
>
> ORDERS that the Motions to Dismiss (Documents #22, 23) are DENIED.

Pet. App. at 16a. The WMX and Buntrock motion to dismiss (Document No. 22) explicitly requested "that the Amended Complaint be dismissed *with prejudice*." WMX and Buntrock Motion to Dismiss at 2 (emphasis added). Hence, the issue of whether to dismiss the Amended Complaint with prejudice is an issue "fairly included within the certified order" denying that motion.

Williams and Dreiling have always understood that the issue of dismissal with prejudice falls within the Fifth Circuit's jurisdiction. In at least five different briefs filed in the Fifth Circuit, Williams and Dreiling contended that **"[i]f this Court finds Plaintiffs' [Appellees'] Complaint is defective under either Rules 9(b) or 12(b)(6), the Complaint should not be dismissed with prejudice."**[3] Williams and Dreiling also requested that the Fifth Circuit grant them leave to

---

[3] Plaintiffs' Response in Opposition to Defendants WMX Technologies, Inc. and Dean Buntrock's Petition for Permission to Appeal the Interlocutory Order Certified by the District Court on March 5, 1996 Pursuant to 28 U.S.C. § 1292(b) at 5 (emphasis in original); Plaintiffs' Response in Opposition to Environmental Industry Association's Petition for Permission to Appeal the Interlocutory Order Certified by the District Court on March 5, 1996 Pursuant to 28 U.S.C. § 1292(b) at 3-4 (emphasis in original); Appellees' Brief in Response to Brief of Appellants' WMX Technologies, Inc. and Dean Buntrock at 3 (emphasis in original); Appellees' Brief in Response to Brief of Appellant EIA at 3 (emphasis in original); Appellees' Brief In Response to Brief of Appellants' WMX Technologies, Inc., Dean Buntrock and Environmental Industry Associations at 47 (emphasis in original).

amend: "In the unlikely event that this Court determines that the Complaint should be dismissed, it should remand this case to the District Court with leave for Appellees to amend their Complaint." Appellees' Br. at 48. In addition, the "**PRAYER**" appearing at the conclusion of their three appellees' briefs to the Fifth Circuit "respectfully request[ed] that this Court . . . remand this case to the District Court with instructions to grant Appellees leave to Amend their Complaint to attempt to cure [any] pleading defects *identified by the Fifth Circuit*." (emphasis indicates language appearing only in appellees' final brief.) All along, Williams and Dreiling understood and acknowledged that the certified order and the appeal of that order included the issues of repleading and dismissal with prejudice.

In addition, the inability of a court of appeals to dismiss with prejudice would be contrary to the policy behind allowing permissive appeals. The Petition correctly notes that to satisfy Section 1292(b), a District Court must find that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." This requirement is designed to promote the "expedition of cases pending before the district courts." S. Rep. No. 2434, 85th Cong., 2d Sess. 2 (1958); *see also* Note, 88 Harv. L. Rev. at 609 (goal of § 1292(b) is to provide "an opportunity to review orders before they result in fruitless litigation and wasted expense"). As the Seventh Circuit has stated, "the purpose of Section 1292(b)" is "to speed litigation and conserve judicial resources . . . ." *In re Healthcare Compare Corp. Sec. Litig.*, 75 F.3d 276, 280 (7th Cir. 1996).

Depriving the Fifth Circuit of the power to dismiss the Amended Complaint with prejudice would, in the present case, render the Section 1292(b) appeal incapable of "materially advanc[ing] the ultimate termination of the litigation." Under Petitioners' theory, the Fifth Circuit would be relegated to returning the defective pleading to

the District Court for more repleading and more future appeals. Restricting the authority of the Court of Appeals in the manner suggested by the Petition engenders expense and delay. To have any serious prospect of materially advancing the ultimate termination of this case, the Fifth Circuit necessarily possessed the authority to dismiss the Amended Complaint with prejudice.

The Petition makes no effort to defend the Rule 9(b) adequacy of the allegations of the Amended Complaint. Rather, as its primary theme, the Petition reasons that the Court of Appeals should have coupled its instruction to dismiss the Amended Complaint with explicit permission to file a third pleading.

> [S]ettled law and practice obligated the Fifth Circuit to afford petitioners the opportunity to file an amended pleading to correct its [amended] pleading in light of the court's views. It is for this reason that this petition for certiorari is brought to this court's attention.

Pet. at 10.[4] Williams and Dreiling cannot shift to the federal courts their responsibility to plead a claim that complies with Rule 9(b). Williams and Dreiling have no right to obtain from a federal court an advisory opinion of "the court's views" on the adequacy of their pleading together with a license to amend. Any such expectation is especially inappropriate here, where the Fifth Circuit accepted the appeal and scrutinized the Amended Complaint with the understood objective of "materially advancing the ultimate termination of the litigation."

---

[4] The Petition goes so far as to imply that any dismissal with prejudice remains improper until and unless a plaintiff seeks leave to file a third complaint. "[W]ithout reasoning or citation to authority, [the Fifth Circuit] seemingly holds that a party that exercises its lawful right to amend under Rule 15(a) commits a procedural waiver of its *right* to seek leave to amend at a later time." Pet. at 17 (emphasis added).

III. THE DISTRICT COURT AND THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT THE CERTIFIED ORDER INVOLVED A CONTROLLING QUESTION OF LAW

Petitioners argue that interlocutory appeal of the District Court's Order denying the motions to dismiss was improvidently granted because there was no "controlling question of law" under Section 1292(b).[5] Pet. at 11-14. Review by this Court of that issue is unwarranted.

The order certified by the District Court and over which the Fifth Circuit accepted jurisdiction involved a controlling question of law. "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enterprise Corp.* v. *Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996); *see also In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982) ("[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court."), *aff'd for lack of a quorum*, 459 U.S. 1190 (1983). In this case, the question of law at issue was, in the District Court's own words, "whether [Petitioners] have satisfied the pleading requirements of 9(b)." Pet. App. at 14a.[6] The

---

[5] An order may be certified for interlocutory appeal under § 1292(b) if it (1) "involves a controlling question of law" (2) "as to which there is a substantial ground for difference of opinion" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

[6] Whether or not a pleading satisfies the particularity requirements of Rule 9(b) is a question of law. *Aldridge v. Lily-Tulip, Inc.*, 741 F. Supp. 906, 915 (S.D. Ga. 1990), *aff'd in relevant part, rev'd in part*, 953 F.2d 587 (11th Cir. 1992). As such, the Court of Appeals reviews the question of whether a pleading satisfies the particularity requirements of Rule 9(b) de novo. *Shushany* v. *Allwaste, Inc.*, 992 F.2d 517, 520 (5th Cir. 1993); *see also Healthcare Compare Corp.*, 75 F.3d at 279 ("Whether the district court

question of a pleading's adequacy is a "controlling" question of law. Depending on how the question was answered, the case would either proceed or be dismissed.

That the Order denying the motions to dismiss was properly certified in this case is supported by the Seventh Circuit's decision in *Healthcare Compare Corp., supra*, a case on which the District Court relied in granting certification. Pet. App. at 14a. *Healthcare Compare Corp.* is virtually identical to this case, both factually and procedurally. In that case, the District Court denied a motion to dismiss a complaint in a securities fraud class action for failure to meet the particularity requirement of Rule 9(b), but certified its order for interlocutory appeal under Section 1292(b). The District Court reasoned that certification was proper "because the case presented a 'close question,' and because a 'massive amount of discovery [is] lurking in this case.' " 75 F.3d at 279 (Seventh Circuit's brackets). The Seventh Circuit accepted the interlocutory appeal, reversed the district court's order, and dismissed the plaintiffs' claims. As in this case, the controlling question of law was "[w]hether the district court correctly refused to dismiss the complaint." *Id.*

Nor is *Healthcare Compare Corp.* the only case in which interlocutory appeal was granted over an order denying a motion to dismiss under Rule 9(b). *See, e.g., Aldridge* v. *Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 953 F.2d 587, 590 (11th Cir. 1992) ("Although the district court concluded that the Plaintiffs stated a RICO claim, it certified the immediate appeal to this court of its determination of the . . . pleading of fraud with particularity issue[]").

Petitioners contend that the courts below impermissibly substituted a " 'close question' formula" borrowed from *Healthcare Compare Corp.* in place of Section

---

correctly refused to dismiss the complaint is a question of law that we review de novo.").

1292(b)'s "controlling question of law" requirement. Pet. at 12. Not so. As noted, one of the requirements of Section 1292(b) is that the order at issue involves a question of law "as to which there is a substantial ground for difference of opinion." Here, the District Court ruled that "the issue of whether plaintiffs have satisfied the pleading requirements of 9(b) is a close question" (Pet. App. at 14a), but that was merely the District Court's shorthand statement that the issue satisfied Section 1292(b)'s substantial-ground-for-difference-of-opinion requirement. Far from relaxing the controlling question requirement of Section 1292(b), the District Court expressly determined that the requirement was met. *See* Pet. App. at 15a ("This Court finds that the issues in this case involve controlling questions of law as to which there is a substantial ground for difference of opinion").

Contrary to the Petition's contention (Pet. at 12-14), there is no conflict between the decision below and *S.B.L.* v. *Evans*, 80 F.3d 307 (8th Cir. 1996). That case arose in a different factual and procedural context and was decided on the basis of a legal principle—ripeness—which is inapplicable here. In *S.B.L.*, the district court certified under Section 1292(b) an order denying a defendant's motion for summary judgment on a sexual harassment claim brought under Title IX of the Education Amendments Act of 1972. The Eighth Circuit held that the interlocutory appeal had been "improvidently granted" on ripeness grounds, explaining that there were too many "unresolved factual issues bearing on the framing and formulation of the legal questions." 80 F.3d at 11, quoting *International Soc'y for Krishna Consciousness* v. *Air Canada*, 727 F.2d 253, 256 (8th Cir. 1984). No such ripeness problem obtains in this case, where the certified order denied a motion to dismiss rather than a motion for summary judgment. Here, the question is whether petitioners' complaint, on its face, satisfies Rule 9(b). To determine that, the Fifth Circuit accepted as true all of the factual allegations made in the Amended Complaint. Therefore, unlike

S.B.L., in this case there were no issues of fact requiring resolution before the legal issue could be addressed.

The Petition warns that "danger" lies in the Fifth Circuit's opinion, characterizing it as a harbinger of "a second opinion practice inconsistent with the policy of restricting interlocutory appeals to 'exceptional circumstances.'" Pet. at 13 (quoting *Healthcare Compare Corp.*, 75 F.3d at 285 (Ripple, J., dissenting). No such danger exists. In the first place, the District Court must certify the interlocutory order for review, an implicit acknowledgment that its order may contain error. Next, Section 1292(b) places the decision of whether to accept the interlocutory appeal of an otherwise unappealable order within the unfettered "discretion" of the Court of Appeals (28 U.S.C. § 1292(b)), with the determination made on a case-by-case basis. Under Section 1292(b), even when the district court certifies an otherwise unappealable order for interlocutory review, the Court of Appeals ultimately controls the appeal process by accepting or rejecting the interlocutory appeal. As a further protection, the merits panel may reconsider and, if necessary, vacate the decision of the motions panel to accept the interlocutory appeal in the first place. *Healthcare Compare Corp.*, 75 F.3d at 279-80. Hence, the Court of Appeals has not one but two opportunities to refuse to accept an appeal under Section 1292(b).

IV. THE COURT OF APPEALS' JURISDICTION EXTENDS TO THE ISSUE OF AMENDMENT

The Petition suggests that the District Court is the court of first, last and only resort with respect to permitting or denying pleading amendments. The petition contends, "[d]iscretionary pleading matters reside with the district courts, and the court of appeals should not reach into such matters." Pet. at 4. According to the caption of Petition Section III, **"THE TRIAL COURT HAS EXCLUSIVE DISCRETION TO PERMIT OR DENY AMENDMENTS."** *Id.* at 14 (emphasis in original). But Williams and Dreiling present neither

legal authority nor persuasive argument concerning why questions of repleading fall outside the jurisdiction of the federal courts of appeal. Section 2106 of Title 26 of the United States Code provides for the contrary:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Indeed, "[t]he power granted by 28 U.S.C. Sec. 2106 to appellate courts to dispose of a case on appeal is broad." *MGPC, Inc.* v. *Dep't of Energy*, 763 F.2d 422, 434 (Temp. Em. Ct. App. 1985); 15A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3901 at 25 (2d ed. 1992).

The appellate court's power to review and reverse the decision of a District Court on the repleading issue is demonstrated by the authority upon which the Petition relies, *Foman* v. *Davis*, 371 U.S. 178 (1962). In *Foman*, the trial court granted a motion to dismiss and denied the plaintiff's motion to amend the complaint. This Court reversed the decision of the trial court, denying leave to amend the complaint, and remanded with instructions to permit the amendment. *Id.* at 181-82. Obviously, this Court did not conclude in *Foman* that "the trial court has exclusive discretion to permit or deny amendments."

Moreover, by repeatedly requesting that the Fifth Circuit instruct the District Court to grant them leave to amend their Amended Complaint, Williams and Dreiling concede the authority of the Fifth Circuit to address and decide this issue. *See supra* at 7, 13. The Fifth Circuit's exercise of its discretion on that issue is limited to the Amended Complaint and the unique circumstances

presented. Nothing about that exercise merits Supreme Court review.

Adopting the position advanced in the Petition—that the Fifth Circuit lacked the authority to dismiss the Amended Complaint with prejudice—would eviscerate the Court of Appeals' "broad power to dispose of the case" by precluding it from disposing of the case at all. Pursuant to Section 2106, the court of appeals "may remand the cause and direct the entry of such appropriate judgment . . . as may be just under the circumstances." This authority empowers the court of appeals to dismiss a complaint with prejudice even where the district court did not. *See United States* v. *Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995) (court of appeals modifies a judgment to dismiss certain claims with prejudice). Indeed, under Section 2106, a court of appeals has the authority, in the first instance, to require the entry of summary judgment even in favor of a non-moving party. *See Abrams* v. *Occidental Petroleum Corp.*, 450 F.2d 157, 165-166 (2d Cir. 1971).

In this case, the Fifth Circuit had before it a pure question of law, namely "[w]hether the district court correctly refused to dismiss the complaint." *Healthcare Compare Corp.*, 75 F.3d at 279; *see also Aldridge*, 741 F. Supp. at 915 ("the issue of whether plaintiffs pled fraud . . . with sufficient particularity under Rule 9(b) is a controlling question of law"). As a question of law, the Court of Appeals reviews the issue "de novo." *Healthcare Compare Corp.*, 75 F.3d at 279. Allowing the Fifth Circuit to perform a de novo review of the Amended Complaint, while circumscribing the relief it can grant to some kind of advisory recommendation, transgresses not only the "broad discretion" conferred by Section 2106, but also defeats the "materially advancing" precondition of Section 1292(b).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

NICHOLAS J. ETTEN*
PETER G. RUSH
MAUREEN WARD KIRBY
MARC DOUGLAS FISHER
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street
Suite 3000
Chicago, IL 60602-4207
(312) 372-1121

LYNNE LIBERATO
HAYNES AND BOONE, L.L.P.
4300 First Interstate Bank Plaza
1000 Louisiana Street
Houston, TX 77002-5012
(713) 547-2000

Counsel for Respondents Waste Management, Inc. and Dean Buntrock

JOSEPH M. HASSETT*
GEORGE H. MERNICK, III
ALBERT W. TURNBULL
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5643

DAVID J. BECK
L. NICOLE BATEY
BECK, REDDEN & SECREST
1331 Lamar, Suite 1570
1331 Houston, TX 77101-2002
(713) 659-8140

Counsel for Respondent Environmental Industry Associations

* Counsel of Record